

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE EASTERN DISTRICT OF TEXAS

3 TYLER DIVISION

4 HTC CORPORATION and HTC) (

5 AMERICA, INC.,) (

6 PLAINTIFFS) (CIVIL ACTION NO.

7) (6:18-CV-243-JRG

8 VS.) (TYLER, TEXAS

9) (

10 TELEFONAKTIEBOLAGET LM) (

11 ERICSSON and ERICSSON, INC.,) (FEBRUARY 15, 2019

12 DEFENDANTS) (8:25 A.M.

13 TRANSCRIPT OF JURY TRIAL

14 BEFORE THE HONORABLE JUDGE RODNEY GILSTRAP

15 UNITED STATES CHIEF DISTRICT JUDGE

16 APPEARANCES:

17 FOR THE PLAINTIFFS: Ms. Jennifer H. Doan
18 Mr. Joshua R. Thane
19 Mr. Cole A. Riddell
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21 COURT REPORTER: Ms. Shelly Holmes, CSR, TCRR
22 Official Reporter
23 United States District Court
24 Eastern District of Texas
Marshall Division
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25 (Proceedings recorded by mechanical stenography, transcript
produced on a CAT system.)

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1 P R O C E E D I N G S

2 (Jury out.)

3 COURT SECURITY OFFICER: All rise.

4 THE COURT: Be seated, please.

5 All right. Counsel, are the parties prepared to
6 read into the record those items from the list of
7 pre-admitted exhibits used during yesterday's portion of the
8 trial?

9 MR. RIDDELL: Yes, Your Honor.

10 THE COURT: Please proceed.

11 MR. RIDDELL: Cole Riddell for HTC.

12 HTC's exhibits introduced into evidence yesterday
13 are Plaintiff's Exhibit No. 73, 74, 76, 81, 104, 124, 130,
14 167, 250, 260, 357, 599, 1119, and 1125.

15 THE COURT: Is there any objection from Defendant?

16 MR. FOUNTAIN: No objection, Your Honor.

17 THE COURT: Do Defendants have a similar rendition
18 to present?

19 MR. FOUNTAIN: We do. Erik Fountain for Ericsson.

20 Defendants' exhibits introduced into evidence
21 yesterday were DX-2, 3, 4, 7, 8, 9, 11, 13, 15, 16, 17, 18,
22 20, 21, 22, 51, 68, 77, all of DX-81, all of DX-82, DX-281,
23 343, and 665.

24 THE COURT: All right. Do Plaintiffs have any
25 objection to that rendition?

1 MR. RIDDELL: No objections, Your Honor.

2 THE COURT: All right. Thank you, counsel.

3 Let me ask this question. With regard to closing
4 arguments, who intends to closes for Plaintiffs and in what
5 order?

6 MS. DOAN: Your Honor, I'm going to do the first
7 part of the closing argument, and Mr. Burman is going to
8 close after the Defendant does.

9 THE COURT: All right. Do you want a warning on my
10 time, Ms. Doan?

11 MS. DOAN: I think I have somebody back there
12 that's going to flag me down. I would like a five-minute
13 warning, Your Honor.

14 I'm going to take 20 to 25 minutes, so if you could
15 give me a warning at 20 minutes.

16 THE COURT: I'll warn you when you've used 20
17 minutes. Remember, Plaintiffs have 35 minutes.

18 MS. DOAN: Yes, Your Honor.

19 THE COURT: And, Mr. Stevenson, am I right you're
20 going to close for Defendants?

21 MR. STEVENSON: Yes, Your Honor.

22 THE COURT: Would you like a warning on your time?

23 MR. STEVENSON: Five minutes, please.

24 THE COURT: Let me also ask this, counsel. I'm
25 told by the Court Security Officer, which until this morning

1 was unknown to me, that that podium swivels, that it is
2 sometimes turned at a 45-degree angle for closing arguments
3 so that it more or less faces the jury. Didn't know that
4 until this morning.

5 Is anybody interested in having the Court Security
6 Officer move -- let them do it. You'll break it.

7 Can you move it for us?

8 COURT SECURITY OFFICER: Yes, sir.

9 THE COURT: Let's go ahead and move it, we'll look
10 at what it looks like, and then we'll decide if we're going
11 to leave it this way or the other way.

12 MS. DOAN: I think it's great, Your Honor.

13 THE COURT: Mr. Stevenson, take a look, see what
14 you think.

15 Mr. Burman, you're welcome to do the same.

16 MR. BURMAN: That's fine.

17 THE COURT: So the consensus is we'll leave it
18 turned; is that right?

19 MS. DOAN: All right.

20 MR. STEVENSON: We've reached agreement.

21 THE COURT: Hope springs eternal.

22 All right. One other thing before I bring the jury
23 in, and I want to communicate this to our friends in the
24 gallery, as well as counsel at the bar.

25 Closing argument and the Court's final instructions

1 to the jury, in my opinion, are the most serious part of a
2 very serious process.

3 Consequently, once I start my final instructions,
4 to be followed by counsels' closing arguments, I don't want
5 any people coming or going from the courtroom unless I
6 should order the courtroom sealed. I don't want any
7 talking. I don't want any drinking of bottles of water
8 tipped up in the air. I don't want any notes being passed.
9 I want you to be as quiet and as focused and as reverent as
10 you can be. I don't want anything to disrupt from my
11 final -- disrupt my final instructions or counsels' closing
12 arguments.

13 If you have been reckless enough to bring an
14 electronic device into this courtroom that's in your purse
15 or in your pocket, make darned sure it is silent or turned
16 off.

17 All right. Also, let me ask this. I understand,
18 Ms. Doan, it's your request that I seal the courtroom for
19 your portion of Plaintiffs' closing argument?

20 MS. DOAN: Yes, Your Honor.

21 THE COURT: But it will not need to be sealed for
22 either Mr. Stevenson's or Mr. Burman's; is that correct?

23 MR. STEVENSON: Your Honor, at about the halfway
24 point of my closing argument, I have a block of 10 minutes
25 to 15 minutes of sealed, and then we'll ask the Court to

1 unseal.

2 THE COURT: How about you, Mr. Burman?

3 MR. BURMAN: It's likely if he has 10 or 15
4 minutes, there'll be something that I'll need to respond to.

5 THE COURT: All right. Well, those of you in the
6 courtroom can readily tell there's going to be sealing and
7 unsealing going on during these closing arguments.

8 I expect you to move quickly and quietly if you're
9 leaving the courtroom. And when I unseal it, I expect you
10 to return quickly and quietly.

11 All right. Counsel, is there anything else before
12 I bring in the jury?

13 MR. BURMAN: Nothing for Plaintiff, Your Honor.

14 MR. STEVENSON: Nothing from Defendants.

15 THE COURT: I have the parties' agreed instruction
16 with regard to the IEEE and the WiFi standard. I will give
17 that as a separate instruction, and then I'll proceed to
18 give my final instructions to the jury.

19 All right. Bring in the jury, please.

20 COURT SECURITY OFFICER: All rise.

21 (Jury in.)

22 THE COURT: Good morning, ladies and gentlemen.
23 Please be seated.

24 Ladies and gentlemen of the jury, I'd like to give
25 you the following instruction which you should know the

1 parties have seen and agreed to.

2 At the beginning of this trial, you were told that
3 HTC was asserting a claim that Ericsson breached its IEEE
4 commitments as to its WiFi standard essential patents.

5 That is no longer an issue in this case. The only
6 contractual obligations in this case relate to the ETSI IPR
7 policy.

8 Now, with that instruction having been given, I'll
9 proceed at this time to give you my final instructions,
10 sometimes called the Court's charge to the jury.

11 Ladies and gentlemen of the jury, you have now
12 heard the evidence in this case, and I'm now going to
13 instruct you on the law that you must apply.

14 I want you to understand that when you retire to
15 deliberate, you are each going to have your own individual
16 printed copy of these instructions.

17 So I would hope you will pay attention and not feel
18 compelled to make notes unless you just want to. But you
19 will have your own copy when you retire to the jury room.

20 It's your duty to follow the law as I give it to
21 you. On the other hand, ladies and gentlemen, as I've said
22 previously, you, the jury, are the sole judges of the facts
23 in this case.

24 Do not consider any statement that I have made over
25 the course of the trial or make during these instructions as

1 an indication to you that I have any opinion about the facts
2 in this case.

3 You're about to hear closing arguments from the
4 attorneys. Statements and arguments of the attorneys,
5 I remind you, are not evidence, and they are not
6 instructions on the law. They're intended only to assist
7 the jury in understanding the evidence and the parties'
8 contentions.

9 A verdict form has been prepared for you, and you
10 will take this verdict form with you when you retire to the
11 jury room. And when you have reached a unanimous decision
12 as to the verdict, you'll have your foreperson fill in the
13 blanks reflecting those unanimous decisions, sign the
14 verdict form on behalf of the jury, date it, and then advise
15 the Court Security Officer that you have reached a verdict.

16 Answer each question in the verdict form from the
17 facts as you find them to be. Do not decide who you think
18 should win the case and then answer the questions to reach
19 that result. Again, your answers and your verdict must be
20 unanimous.

21 Now, in determining whether any fact has been
22 proven in this case, you may, unless otherwise instructed,
23 consider the testimony of all the witnesses, regardless of
24 who may have called them. And you may consider the effect
25 of all the exhibits received and admitted into evidence,

1 regardless of who may have produced them or presented them.

2 As I've told you before, you, the jury, are the
3 sole judges of the credibility and believability of each and
4 every witness and the weight and effect to be given to the
5 evidence in this case.

6 I've also told you previously that the attorneys in
7 this case are acting as advocates for their competing
8 parties and their completing claims, and they have a duty to
9 object when they believe evidence is being offered that
10 should not be admitted under the rules of the Court.

11 In the case where the Court has sustained an
12 objection to a question addressed to a witness, you must
13 disregard the question entirely, and you may draw no
14 inference from its wording or speculate about what the
15 witness would have said if I had allowed them to answer the
16 question.

17 On the other hand, if an objection was overruled by
18 the Court, then you must treat the question and the answer
19 just as if no objection had been made, like any other
20 question and answer.

21 Now, at various times over the course of the trial,
22 it's been necessary for the Court to discuss things and talk
23 with the attorneys here at the bench or outside of your
24 presence when you were in the jury room. This happens
25 during trials because there are things that occur that do

1 not directly involve the jury.

2 You should not speculate, ladies and gentlemen,
3 about what was said during such discussions that took place
4 outside of your presence.

5 Now, there are two types of evidence that you may
6 consider in properly finding the truth as to the facts in
7 this case.

8 One is direct evidence, such as the testimony of an
9 eyewitness witness.

10 The other is indirect or circumstantial evidence --
11 that is, the proof of a chain of circumstances that
12 indicates the existence or the non-existence of certain
13 other facts.

14 As a general rule, you should know that the law
15 makes no distinction between direct and circumstantial
16 evidence but simply requires that you, the jury, find the
17 facts based on the evidence presented, both direct and
18 circumstantial.

19 Now, from time to time over the course of the
20 trial, you have seen documents that have redactions in them,
21 portions that have been blacked out. Those documents were
22 redacted by agreement of the parties in this case, and you
23 are not to consider those redactions as an indication that a
24 party is trying to hide anything. You should not guess or
25 speculate about what has been redacted in any document or

1 why the document has been redacted.

2 Now, the parties have stipulated or agreed to some
3 facts in the case, and when the lawyers for both sides
4 stipulate as to the existence of a fact, you must, unless
5 otherwise instructed, accept the stipulation as to the
6 evidence and regard the fact as proven.

7 Also, certain testimony has been presented to you
8 during this trial in the form of depositions. A deposition
9 is a sworn recorded answers to questions asked to a witness
10 under oath in advance of a trial. If a witness cannot be
11 present to testify in person, that witness's testimony may
12 be presented under oath in the form of a deposition.

13 As -- as I've told you earlier, the attorneys for
14 the case representing the parties have questioned these
15 deposition witnesses under oath in advance of the trial.

16 At those times, a court reporter was present, and
17 the questions asked and the answers given were recorded and
18 taken down.

19 Deposition testimony is entitled to the same
20 consideration by you as testimony of a witness who has
21 appeared in person and testified from the witness stand in
22 open court.

23 As a result, ladies and gentlemen, you should judge
24 the credibility and the importance of deposition testimony
25 to the best of your ability, just as if the witness had

1 personally testified from the witness stand in open court.

2 Now, at least one or more witnesses in this case
3 have testified both live before you and by deposition. You
4 should not speculate or draw any inferences as to why a
5 witness testified both live and both by deposition in this
6 case.

7 Now, while you should consider only the evidence in
8 the case, ladies and gentlemen, you should understand that
9 you, the jury, are permitted to draw such reasonable
10 inferences from the testimony and the exhibits as you feel
11 are justified in the light of common experience.

12 Let me say it another way. You, ladies and
13 gentlemen, may make deductions and you may reach conclusions
14 that reason and common sense lead you to draw from the facts
15 that have been established by the testimony and the evidence
16 in this case.

17 However, you should not base your decision on any
18 evidence not presented by the parties in open court during
19 the course of the trial, including your own personal
20 experiences.

21 Now, unless I instruct you otherwise, you may
22 properly determine the testimony of a single witness is
23 sufficient to prove any fact, even if a greater number of
24 witnesses may have testified to the contrary, if after
25 considering all the other evidence you believe that single

1 witness.

2 When knowledge of a technical subject may be
3 helpful to the jury, a person who has special training and
4 experience in that technical field, called an expert
5 witness, is permitted to state his or her opinions on those
6 technical matters to the jury.

7 However, ladies and gentlemen, you're not required
8 to accept those opinions. As with any other witness, it's
9 solely up to you to decide who you believe, who you don't
10 believe, and whether or not you want to rely on that
11 testimony.

12 Now, over the course of the trial, certain exhibits
13 have been shown to you that were illustrations. We call
14 these types of illustrations demonstrative exhibits.
15 Sometimes they're simply called demonstratives for short.

16 Demonstrative exhibits are a party's description,
17 picture, or model to describe something involved in the
18 trial.

19 If your recollection of the evidence differs from
20 the demonstratives, you should rely only on your own
21 recollection of the evidence.

22 Remember, demonstrative exhibits, which are
23 sometimes called jury aids, are not evidence themselves, but
24 a witness's testimony during which they use a demonstrative
25 is evidence.

1 Demonstrative evidence -- demonstrative exhibits
2 are not admitted exhibits in the trial, and they will not be
3 available to you to consider in the jury room while you
4 deliberate.

5 Now, in any legal action, facts must be proven by a
6 required amount of evidence known as the burden of proof.
7 The burden of proof in this case is on the Plaintiffs for
8 some issues, and it's on the Defendants for other issues.

9 There is one burden of proof that you will apply in
10 this case, and that burden of proof is the preponderance of
11 the evidence.

12 The Plaintiffs in this case, HTC Corporation and
13 HTC America, Inc., who I'll refer to simply as the
14 Plaintiffs, or collectively as HTC, they have the burden of
15 proving their breach of contract claims by a preponderance
16 of the evidence.

17 The Defendants in this case, Ericsson Inc. and its
18 Swedish parent company, Ericsson, who I'll collectively
19 refer to as the Defendants or as Ericsson, they have the
20 burden of proving their claim that HTC breached its
21 obligation to negotiate in good faith by a preponderance of
22 the evidence.

23 A preponderance of the evidence means the evidence
24 that persuades you, the jury, that a claim is more probably
25 true than not true. This is sometimes talked about as being

1 the greater weight and degree of credible testimony.

2 Now, in determining whether any fact has been
3 proven by a preponderance of the evidence, you may, unless
4 instructed, consider the stipulations of the parties, the
5 testimony of all the witnesses, regardless of who may have
6 called them, and all the exhibits that have been admitted
7 into evidence during the trial regardless of who produced
8 them or introduced them.

9 Now, ladies and gentlemen, the fact that a person
10 brought a lawsuit creates no inference that the person is
11 entitled to a judgment. Anyone may make a claim, and anyone
12 may file a lawsuit.

13 The act of making a claim in a lawsuit by itself
14 does not in any way tend to establish that claim, and it is
15 not evidence. Therefore, you should draw no inference that
16 HTC is entitled to a judgment solely because it filed a
17 lawsuit against Ericsson.

18 Similarly, you should draw no inference that
19 Ericsson is entitled to a judgment solely because it has
20 filed counterclaims in this lawsuit against HTC.

21 Now, as I did at the beginning of the case, I'll
22 give you a summary of each side's contentions in the case,
23 and I'll then provide you with instructions as to what each
24 side must prove to win on each of their contentions.

25 As I've told you earlier, this is a breach of

1 contract case, and the contract at issue is for licenses to
2 patents related to cellular technologies.

3 HTC, the Plaintiffs, contend that Ericsson, the
4 Defendants, breached its contract -- Ericsson's contract
5 with the European Telecommunications Standards Institute,
6 known as ETSI.

7 Ericsson denies that its breached any contractual
8 obligations.

9 Ericsson also contends that HTC, the Plaintiffs,
10 have breached their obligation to negotiate with Ericsson in
11 good faith toward a license.

12 HTC denies that it has breached any obligation to
13 negotiate with Ericsson in good faith toward a license.

14 Now, generally, if a party asserts a breach of
15 contract claim, ordinarily, it seeks money damages as a
16 remedy for the alleged breach of contract.

17 In this case, however, neither HTC nor Ericsson are
18 seeking money damages from the other.

19 As a result, your job in this case is simply to
20 decide whether or not HTC or Ericsson have breached their
21 respective contractual obligations.

22 Now, before you can decide these issues, you'll
23 need to understand the terms of the contract at issue in
24 this case.

25 A contract is a legally enforceable promise or set

1 of promises. When two individuals or entities enter into a
2 contract that is intended to benefit a third party, the
3 third party has standing to enforce the terms of the
4 contract in the event that it is breached.

5 The contract at issue in this case is for a license
6 to patents.

7 If an individual invents something, he or she may
8 apply for a patent on that invention. Patents are granted
9 and denied in this country by the United States Patent and
10 Trademark Office and in other -- and in other countries by
11 their counterpart agencies. Other countries, as I've said,
12 have similar provisions and systems involving patents, and
13 the patents in this case were obtained from various parts of
14 the world.

15 Now, a patent gives the patentholder a right to
16 prevent others from making, using, offering to sell, or
17 selling the patented invention without the patentholder's
18 permission.

19 A patentholder may also decide to give others
20 permission to use its invention. That permission is called
21 a license.

22 The recipient of a license is called a licensee.
23 Typically, in exchange for permission to use the invention
24 in a patent, the licensee will pay the patentholder, who in
25 that context is called the licensor, and those payments are

1 called royalties.

2 Ericsson entered into a contract with ETSI. ETSI
3 is a standards setting organization that is made up of
4 member organizations. ETSI adopted the 2G, 3G, and 4G, also
5 called LTE, cellular communications standards that are at
6 issue in this case.

7 Ericsson made a commitment to ETSI that it would
8 license its patents essential to the 2G, 3G, and 4G/LTE
9 standards on terms that are fair, reasonable, and
10 non-discriminatory, otherwise known as FRAND terms.

11 Whether or not a license is FRAND will depend upon
12 the totality of the particular facts and circumstances
13 existing during the negotiations and leading up to the
14 license.

15 Ladies and gentlemen, there is no fixed or required
16 methodology for setting or calculating the terms of a FRAND
17 license rate.

18 Now, although HTC is not a party to Ericsson's
19 contract with ETSI, HTC is a third-party beneficiary to
20 Ericsson's FRAND commitment to ETSI.

21 HTC contends that Ericsson breached its commitment
22 to ETSI by failing to offer to HTC a license to Ericsson's
23 2G, 3G, and 4G/LTE standard essential patents on FRAND
24 terms.

25 A duty of good faith exists with respect to

1 Ericsson's contractual obligations to ETSI. A party to a
2 contract has a duty to perform in good faith the obligations
3 imposed by the contract.

4 Good faith performance of a contract requires being
5 faithful to the agreed common purpose of the contract and
6 performing consistently with the justified expectations of
7 the parties.

8 HTC contends that Ericsson breached its duty of
9 good faith in carrying out its contractual obligations to
10 ETSI.

11 Ericsson contends that HTC breached its duty of
12 good faith in negotiating with Ericsson for a license.

13 To find that HTC or Ericsson has breached a
14 contractual obligation, you must conclude that the party
15 bound by the contract did not fulfill its obligations under
16 the contract.

17 Now, with those instructions, ladies and gentlemen,
18 we are prepared to hear closing arguments from the attorneys
19 in the case.

20 The Plaintiff will present its first closing
21 argument at this time, and pursuant to the Plaintiffs'
22 earlier request, I'll order the courtroom sealed at this
23 time.

24 Those present, not subject to the protective order,
25 should excuse themselves until I unseal the courtroom.

1 (Courtroom sealed.)

2 (Sealed Portion No. 21 saved in a separate sealed
3 transcript.)

4 (Courtroom unsealed.)

5 MS. DOAN: Thank you.

6 THE COURT: Ms. Doan, I believe you left your
7 glasses on the podium.

8 MS. DOAN: I could use those.

9 THE COURT: All right. Mr. Stevenson, you may
10 present the Defendants' closing argument.

11 Would you like a warning on your time?

12 MR. STEVENSON: Yes, I would, Your Honor. Five
13 minutes, please.

14 THE COURT: All right. You may proceed.

15 MR. STEVENSON: Thank you. And may it please the
16 Court.

17 And ladies and gentlemen of the jury, good morning.

18 When I first addressed you in this case,
19 I suggested that this wasn't a case of discrimination, and
20 it wasn't a case of unfair treatment or unreasonable offers,
21 but rather it was a case of paying fair value for what you
22 use. And I think the evidence has really borne that out in
23 this case.

24 HTC has challenged the market. They've challenged
25 Ericsson's offer. They've challenged our good faith. But

1 they haven't presented any evidence that the market got it
2 wrong or that Ericsson was in bad faith or that our offer
3 wasn't FRAND.

4 And when HTC originally presented its 10-cent
5 offer, I -- I looked for a way to -- to convey to you how
6 Ericsson felt about that, why we reacted. And the reaction
7 actually came from the witness stand when Ms. Woodin had
8 Dr. Parkvall on the stand.

9 We brought you Dr. Parkvall as our first witness,
10 because we felt you needed to meet the person who is the
11 heart and sole of Ericsson. It's an innovative company.
12 That's its culture. It's been its culture for a century.

13 And when he was on the stand, at the very end of
14 his testimony, the following exchange took place.

15 Will you go to the next slide, Mr. Moreno?

16 Did you hear, I think, Mr. Perryman or Dr. Perryman
17 say that the value of all cellular, 2G, 3G, 4G, is between
18 19 cents and \$1.22?

19 And Dr. Perryman answered: Yeah, I heard that, and
20 it almost makes me upset, I must say.

21 How does that make you feel?

22 I mean, I spent 20 years of my career working on
23 cellular system, and I'm not the only one. Thousands of
24 colleagues in Ericsson and other companies that go to these
25 meetings and spend a lot of effort enhancing these systems,

1 providing high data rates, et cetera, and I definitely think
2 it's worth more than a dollar.

3 And you could tell how he felt about HTC's
4 suggestion that all his work and the work of all the
5 colleagues that he has, his friends in the industry at the
6 standards meetings is worth 20 cents, a dollar. And that
7 the offer from HTC didn't really respect all that hard work.

8 That sums up, I think, more than words I could ever
9 say, how we feel about this case and what we think this case
10 is about.

11 Now, HTC didn't bring an innovator to trial. And
12 that's because HTC bases its research and development on the
13 work of others.

14 And the great thing about FRAND is, what -- what
15 really makes the system work is FRAND permits companies who
16 want to get into the cell phone market to use the
17 innovations of others, companies like Ericsson, Texas
18 Instruments, Nokia, Qualcomm, who have research departments
19 and engineers and they contribute that to -- to the
20 standards.

21 And the only issue -- the only thing is it's not
22 free, and it's not pennies. Pay fair value, and that's all
23 we ask is fair value.

24 You know, Ericsson spends over \$3 billion a year on
25 research and development. It has 23,000 engineers, cellular

1 engineers who work with Dr. Parkvall. That's more than the
2 average attendance at a major league baseball game. Imagine
3 this stadium filled with cellular engineers, and that's just
4 Ericsson's contribution.

5 And what do these people turn out? What do these
6 engineers contribute? These, ladies and gentlemen, are
7 Ericsson's standard essential patents, 195. And these are
8 just one patent representative each of a family, okay?
9 195 representative patents. Each one stands for about 15
10 worldwide. If I put all the patents Ericsson has been
11 awarded for 4G -- this is just 4G -- in these boxes, there
12 would be 15 of them.

13 But they're not just paper, okay? Each patent has
14 a story, and it -- an inventor, somebody who is proud of his
15 work, who has had a eureka moment, who has worked long
16 nights.

17 And these inventions deal with all aspects of your
18 cell phone, how it communicates, carrier aggregation,
19 advanced antenna, sleep mode, security, data transmission.
20 They make your cell phone work. They make it more secure.
21 They make it faster. They make it more efficient. And it's
22 worth more than 10 cents.

23 Now, HTC suggests that, well, these patents are
24 practiced by a single chip on a phone, and the industrywide
25 royalty -- you know, what everybody should split up is a

1 small portion of the profit margin of a chip.

2 But on the witness stand, HTC's expert,
3 Dr. Perryman, backed off his opinions. And he said this is
4 just one way of many of looking at things. And Ms. Doan
5 didn't really even mention this theory in her closing
6 argument.

7 But I want to address it very briefly because this
8 is the -- the rationale that underlied HTC's negotiating
9 position, that Ericsson just fundamentally didn't agree
10 with. And the fundamental disagreement is that the cost of
11 stamping a chip by a chip company bears no relationship to
12 the value of the intellectual property that's encoded on the
13 chip.

14 Just like when you buy a computer program on a
15 CD-ROM, the cost of burning that CD-ROM, a few cents, bears
16 no relationship to the intellectual property, the program
17 that's encoded on it.

18 And when you buy a book, the cost of the print and
19 the paper and the binding bears no relationship to the value
20 of the story that's in the book.

21 Here, Dr. Perryman urged us repeatedly, look at the
22 market, look at the market. I agree, let's look at the
23 market. That's why we showed you these examples of an iPod
24 versus an iPhone, a \$350.00 difference in value attributable
25 only to cellular.

1 And the HTC Nexus 9 which has \$120.00 difference in
2 value solely due to cellular.

3 But common sense. What would your phone be like,
4 what would it be worth if you didn't have cellular? And
5 what would you pay to add it?

6 Now, HTC's theory was based on the fundamental
7 misconception that all of Ericsson's patents are practiced
8 on a chip and they're not the patent claims, which
9 Ericsson -- which Ericsson showed you and HTC never talked
10 about, are all directed to mobile terminals, mobile devices,
11 that sort of thing.

12 But the cell phone industry has also rejected this
13 model. Companies who negotiate with Ericsson, some of the
14 most sophisticated companies in the world who have their own
15 patent portfolios, and they come armed for -- for hard
16 negotiations. None of them advanced this theory and
17 obtained license agreements based on the cost of a chip.

18 So you saw documents about attack on FRAND. Yes,
19 this is the attack on FRAND, and it is utterly and
20 completely misplaced.

21 Now, realizing, I think, the weakness in this
22 theory, HTC has pivoted in this case, and now, they want to
23 talk more about discrimination. They want to look at other
24 offers. And if you -- their theory is if you don't agree
25 with our licensing model or based on the chip cost, find

1 that there was a breach of FRAND based on discrimination.
2 And that's based on arguments that HTC's lawyers came up
3 with after they got discovery in this case.

4 But the charge of discrimination is wrong also.
5 And to address that, we brought Ms. Christina Petersson to
6 speak to you. Her job is to make sure that Ericsson is fair
7 in its -- in its business dealings, and she obviously takes
8 her job very seriously. And I believe she sincerely
9 believes that Ericsson has done nothing wrong in its
10 negotiations.

11 Now, there's been a lot of discussion about what
12 this FRAND contract requires, and I want to turn to that
13 briefly.

14 We rely primarily on the actual ETSI documents, the
15 Court's instruction, and the testimony of Dr. Huber who
16 participated in the drafting of the policy. And replete
17 throughout this policy are statements about balance,
18 adequate and fair reward to patent owners, no preference for
19 specific licensing model.

20 But in addition, we brought you the testimony of
21 one of the people who actually was involved in the drafting.
22 And this was a contract. And once the contract was drafted
23 in 1994, you don't change the terms. And what Ericsson
24 signed onto was a contract where ETSI -- and we asked him:
25 Has ETSI ever had a most favored licensing requirement of

1 any kind in the IPR policy that ETSI put into effect?

2 No, it hasn't.

3 But what you'll see now when we talk about the
4 other agreements that Ericsson has entered into is that
5 that's what HTC is asking for, a most favored licensee,
6 which was never ever part of the contract.

7 At this point, Your Honor, I must ask the Court to
8 seal the courtroom.

9 THE COURT: All right. I'll order the courtroom
10 sealed at this time.

11 If you're present and not subject to the protective
12 order in this case, you should exit and remain outside until
13 the courtroom is unsealed.

14 (Courtroom sealed.)

15 (Sealed Portion No. 22 saved in a separate sealed
16 transcript.)

17 (Courtroom unsealed.)

18 THE COURT: You're free to continue, counsel.

19 MR. STEVENSON: I'd like to now turn to another
20 piece of evidence we saw, and that is pool. And this is
21 public information.

22 Again, if you're in the market and you want to know
23 what the market says, and HTC is part of the market, in
24 addition to knowing its own deals with other patentholders,
25 it can turn to the pool rates. In fact, their expert,

1 Dr. Van Uden, looked at the pool rates, put them in a report
2 that he delivered to HTC during negotiations.

3 Now, the pool rate he looked at was Via. And
4 that's DX-343. And Via, who Dr. Lynde testified --
5 testified has a somewhat weaker patent portfolio for
6 4G than Ericsson, charges \$2.55 a unit for companies with
7 about two million in sales.

8 And this is important for a couple of reasons. The
9 first reason it's important is it shows you, again,
10 Ericsson's rate is pretty comparable to what's being charged
11 by others in the market, and this is public. It's been out
12 there for a long time. There's no evidence that anybody's
13 ever challenged this for -- for not being FRAND or -- I
14 mean, it's out an there understood public data point for
15 everybody, okay? That's Point No. 1.

16 Point No. 2 is it embeds a volume discount,
17 obviously. And, again, that's normal because these
18 negotiations take a lot of time and effort. And if Ericsson
19 can go to a company like Samsung and license
20 330 million units in one deal, as opposed to going to a
21 company that sells one million units and cutting 330 deals
22 to reach the same volume -- I mean, imagine that savings and
23 transaction cost. And that's what drives a lot of these
24 volume discounts.

25 Now, you know, HTC now wants to claim, well, maybe

1 those are discriminatory, but they're not.

2 In fact, HTC asked Ericsson in the mid-2000s for a
3 volume discount in negotiations. And HTC actually had
4 agreements with volume discounts with Motorola and
5 Alcatel-Lucent.

6 But this is a situation I think now where because
7 of HTC's slighted sales, you know, they don't qualify for
8 the volume discount anymore. And, now, they're saying in
9 court, well, if we can't get it, it must be discriminatory,
10 vote against Ericsson.

11 I'm going to talk -- I want to talk now a little
12 bit about the relationship between HTC and Ericsson, but
13 before I do, I want to summarize.

14 Based on the evidence you've seen on the
15 comparables, all the market evidence, I think it's clear
16 that Ericsson was offering HTC a fair, reasonable, and
17 non-discriminatory royalty rate. You know, we didn't single
18 them out for unfair treatment. We gave them rates in
19 accordance with their industry peers.

20 If you look at the prior deal HTC had with
21 Ericsson -- in the negotiations, we offered them yet again
22 the same rate as a renewal. I mean, that's the essence of
23 good faith.

24 And -- and these other companies that HTC points
25 to, and then they unpack or extrapolate the numbers and say,

1 well, this is different, this is less, this is less, all
2 that math is just we think fundamentally wrong. And they
3 also failed to take into account the other factors that
4 drive these deals like the geography, et cetera.

5 So there's no singling out for unfair treatment
6 here, there just isn't. Ericsson sincerely wants to reach a
7 deal with HTC. And as you'll see, was trying to continue to
8 negotiate, trying to continue to offer reformulated
9 proposals to HTC when they surprised us by suing us.

10 And that's what I want to turn to next. Now, what
11 matters in this case is the 2016 negotiations for the
12 renewal between Ericsson and HTC. And those are
13 negotiations between Mr. Woo and Mr. Earle.

14 But as a bit of a tangent, HTC brought in a witness
15 from the past who had been involved in negotiations 10 years
16 ago with Ericsson, Ms. Grace Lei. And I want to say just
17 one word about her. She -- she took the stand. She told
18 you she was unbiassed. She didn't work for the company
19 anymore and was going to give you objective testimony.

20 But what she didn't tell you which came out on
21 cross-examination was she had received a \$15 million
22 investment in her start-up company from the chairwoman of
23 HTC.

24 I think you have every right to question her
25 credibility and her motive for coming to Texas to testify.

1 But that all deals with the past.

2 And, you know, in negotiations, sometimes there's
3 personalities, but in the past with HTC, deals got worked
4 out, and there was never litigation between these two
5 companies. They worked out deals.

6 But, now, we get to 2016. For this negotiation,
7 the renewal negotiation, to testify, we brought our lead
8 negotiator, Robert Earle. And as you can tell, Mr. Earle is
9 a straight shooter. He's a man of his word. And I think
10 that came through very clearly in the testimony and
11 particularly in the cross-examination.

12 In many ways in this negotiation, Mr. Earle was in
13 a no-win situation because I think it's fair to say, and
14 I think you saw, that before they even started going down
15 the road with Ericsson, HTC was gearing up for litigation.

16 You may remember the testimony of Mr. Woo on this
17 point. I was asking him: Sir, did you or did you not
18 anticipate litigation with Ericsson in July of 2016?

19 That was a possibility.

20 That's before HTC had gotten any information from
21 Ericsson, the claim charts, the representative patent list,
22 the statistics on, you know, the numbers of patents in
23 different categories, all that information. And, you know,
24 he put up that timeline that omitted all that from the
25 timeline.

1 And, in fact, on the claim charts -- you know,
2 Ericsson sent the claim charts, all of them to HTC, ready to
3 have technical negotiations. And we played a deposition
4 near the end of our case -- or read it in, and their
5 technical negotiator admitted he never read the claim
6 charts. He never even got them.

7 THE COURT: Five minutes remaining.

8 MR. STEVENSON: So the truth is, even after HTC
9 offered 10 cents a phone and how Ericsson felt about that
10 offer, we continued to negotiate. We absolutely continued
11 to negotiate. And during this whole time, we were
12 absolutely prepared to grant a FRAND license. But a FRAND
13 license isn't 10 cents.

14 And Ericsson in a lot of negotiations, people would
15 have walked away. If you go to a car dealership and you
16 offer a thousand dollars for a \$25,000.00 car, they're not
17 going to respond.

18 Ericsson stayed in the game. Mr. Earle flew to
19 Taiwan to meet Mr. Woo for 12 minutes to find out why he was
20 offering 10 cents. They went back a second time with two
21 negotiators for a longer meeting to find out why 10 cents.

22 And, of course, Ericsson heard the theory about the
23 portion of the profit margin of the chipset, and it
24 disagreed. It absolutely disagreed.

25 But rather than give up, rather than walk away,

1 Ericsson stayed in the game. And the negotiators who met
2 with HTC on March 31st and were asked by Mr. Woo to do
3 homework, to give them a presentation justifying our offer,
4 they flew back to Texas, began to work, began to reformulate
5 an offer, maybe we can restructure the offer, maybe we can
6 do a counter to keep things moving. And less than five
7 business days later, the lawsuit hit.

8 And, of course, they stopped work, because now
9 litigation has to -- litigation is pending, and information
10 gets exchanged through the litigation process. And that's
11 unfortunate.

12 And HTC tried to suggest, well, we were afraid of
13 litigation. They had almost three months remaining in the
14 grace period. That's not -- that's not the excuse.

15 HTC tried to tell you, well, we couldn't accept the
16 offer because we didn't know what all of Ericsson's
17 comparable licenses were -- licenses were. How could we
18 assure ourselves we were being treated fairly.

19 And, you know, Ericsson was willing to work with
20 them. Mr. Earle proposed a mediator, a confidential
21 referee, which Ericsson has done before with companies when
22 they want this. We'll give you the licenses,
23 Mr. Confidential Referee, and you tell both parties, is this
24 a fair offer. And HTC never took us up on that.

25 Why wouldn't they take us up on that? Well, I

1 think the answer is, they didn't want a fair deal. They
2 didn't want a 2.50 deal. Whether it was fair or not, they
3 didn't want that. They were pursuing a lawsuit. They were
4 papering the file. And if they would have sent the -- the
5 licenses to a referee and the referee would have come back
6 and said, yeah, this is fair, they don't have any excuse
7 anymore not to sign.

8 Now, ladies and gentlemen, you're going to receive
9 from the Court a verdict form. And I'd like to respectfully
10 suggest to you how Ericsson would ask you to respond to the
11 questions.

12 The first question you're going to get is: Did HTC
13 prove by a preponderance of the evidence that Ericsson
14 breached its contractual obligation to HTC to offer a
15 license on fair, reasonable, and non-discriminatory terms?

16 And we suggest the answer to that is: No. We
17 didn't breach that obligation.

18 The second question you'll be asked is: Did HTC
19 prove by a preponderance of the evidence that Ericsson
20 breached its duty to negotiate in good faith by carrying out
21 its contractual obligation to negotiate with HTC license to
22 Ericsson's essential patents.

23 And, again, we suggest the answer is: No. HTC
24 hasn't proved that.

25 We offered HTC rates that were consistent with

1 other licensees, consistent with what HTC has paid other
2 4G patent owners in the past, and consistent with our own
3 prior agreement. And I think that's the essence of good
4 faith licensing.

5 And their model that they've abandoned now was what
6 drove their counter offer, and they didn't even talk about
7 it in their closing.

8 And the final question is our counterclaim: Did
9 Ericsson prove that HTC failed to negotiate in good faith?
10 And on that counterclaim, ladies and gentlemen, we're not
11 seeking damages. And you won't be asked to award damages.
12 We filed this counterclaim to clear our name.

13 And, finally, let me end on this. You know, this
14 lawsuit is a serious allegation. There's a lot of people
15 here that have been watching this. It's of great importance
16 to our industry. It's of great importance to the cellular
17 industry. This lawsuit has challenged the integrity of
18 Ericsson. It accuses us of discrimination. And the
19 employees of Ericsson of proud of their technical
20 contributions and very rightfully so. They didn't single
21 out HTC. They didn't treat HTC unfairly.

22 Ladies and gentlemen, we thank you for your
23 service.

24 I mean, this has been a long week. We appreciate
25 how seriously you've taken the evidence in this case and

1 your obligations as jurors. Ericsson, our legal team, thank
2 you thank you very much for your service. And we look
3 forward to receiving your verdict. Thank you.

4 THE COURT: All right. Plaintiffs may now present
5 their final closing argument.

6 Mr. Burman, Plaintiffs have 10 minutes and 22
7 seconds remaining. Would you like a warning on your time?

8 MR. BURMAN: Yes, I would, at five minutes.

9 THE COURT: Five minutes. And if your argument
10 requires you to seal the courtroom, just let me know.

11 MR. BURMAN: It does, Your Honor, and it will go so
12 fast that it's probably better to do it right now.

13 THE COURT: All right. Then at counsel's request,
14 I'll order the courtroom sealed and direct that those
15 present, not subject to the protective order in this case,
16 excuse themselves and remain outside until the Court unseals
17 the courtroom.

18 (Courtroom sealed.)

19 (Sealed Portion No. 23 saved in a separate sealed
20 transcript.)

21 (Courtroom unsealed.)

22 THE COURT: For the record, the courtroom is
23 unsealed.

24 Ladies and gentlemen of the jury, I'd like to
25 provide you with a few final instructions before you begin

1 your deliberations.

2 You must perform your duty as jurors without bias
3 or prejudice as to any party. The law does not permit you
4 to be controlled by sympathy, prejudice, or public opinion.

5 All parties in this case expect that you will
6 carefully and impartially contract all the evidence, follow
7 the law as I have given it to you, and reach a just verdict,
8 regardless of the consequences.

9 Answer each question in the verdict form from the
10 facts as you find them to be in this case, following the
11 instructions that the Court has included. Again, do not
12 decide who you think should win and then answer the
13 questions accordingly.

14 I remind you, your answers and your verdict must be
15 unanimous.

16 You should consider and decide this case as a
17 dispute between persons of equal standing in the community,
18 equal worth, and holding the same or similar stations in
19 life.

20 This is true in cases between corporations,
21 partnerships, and individuals. The law recognizes no
22 distinction between types of parties. All corporations,
23 partnerships, and other business organizations stand equal
24 before the law, regardless of their size and regardless of
25 who owns them, and they are to be treated as equals.

1 Now, when you retire to the jury room to deliberate
2 on your verdict, you're each going to have a copy of these
3 final jury instructions that I'm giving you.

4 If during your deliberations you desire to review
5 any of the exhibits, not the demonstratives, but the
6 exhibits which the Court has admitted into evidence during
7 the trial, then you should advise me by a written note
8 signed by your foreperson and delivered to the Court
9 Security Officer. I'll then send to you that exhibit or
10 those exhibits.

11 Once you retire, you should first select your
12 foreperson and then conduct your deliberations.

13 If you recess during your deliberations, follow all
14 the instructions that the Court has given you about your
15 conduct during the trial.

16 After you've reached a verdict, your foreperson is
17 to fill in the blanks in the verdict form reflecting your
18 unanimous answers to those questions.

19 Do not reveal your answers until such time as
20 you're discharged, unless otherwise directed by me. And you
21 must never disclose to anyone, not even to me, your
22 numerical division on any question.

23 Any notes that you've taken over the course of the
24 trial, remember, they are aids to your memory only. If your
25 memory should differ from your notes, then you should rely

1 on your memory and not your notes.

2 The notes are not evidence. And a juror who has
3 not taken notes or who has taken very few notes should rely
4 on his or her own independent recollection of the evidence,
5 and you -- that juror should not be unduly influenced by the
6 notes of other jurors. Notes are not entitled to any
7 greater weight than the recollection or impression of the
8 juror about the testimony.

9 If during your deliberations you want to
10 communicate with me at any time, then you should give a
11 message or a question written and signed by your foreperson
12 to the Court Security Officer who will bring it to me.

13 I will either then respond to you as promptly as
14 possible either in writing or by having you brought back
15 into the courtroom where I can address you orally. I will
16 always first disclose to the attorneys in the case your
17 question and my response before I answer any question.

18 After you've reached a verdict and I have
19 discharged you from your obligations as jurors, you are not
20 required to talk with anyone about your service in this
21 case.

22 But by the same token, ladies and gentlemen, once I
23 have discharged you, you are free to talk with anyone about
24 your service in the case. But that decision is totally and
25 100 percent yours and yours alone to make.

1 I'm now going to hand eight copies of these final
2 jury instructions and one clean copy of the verdict form to
3 the Court Security Officer who will deliver them to you in
4 the jury room.

5 Members of the jury, you may now retire to the
6 juror -- jury room to deliberate on your verdict. We await
7 your decision.

8 COURT SECURITY OFFICER: All rise.

9 (Jury out.)

10 THE COURT: Be seated, please, please.

11 Whose cell phone was that that sounded during my
12 final instructions to the jury?

13 DR. PERRYMAN: It was mine, Your Honor. I
14 apologize.

15 THE COURT: I thought it was, Dr. Perryman. Were
16 you present when I gave my instructions?

17 MR. PERRYMAN: Yes, sir, I was. I was under the
18 impression it was not on, and I apologize.

19 THE COURT: I'd like to do something about it, but
20 I really don't know what to do. Just don't ever let it
21 happen again in this court in front of me.

22 MR. PERRYMAN: Yes, sir, Your Honor. Thank you.

23 THE COURT: Counsel, make sure if you do not elect
24 to wait for a verdict here in the courtroom, that you
25 furnish my staff with accurate cell phone numbers where you

1 can be reached if you are off premises.

2 You're free to wait here in the courtroom. You're
3 also free to retire to whatever other location you have as
4 long as we can contact you and you can get here promptly in
5 the event of a note or in the event that a verdict is
6 returned.

7 Also, I'd like two representative cell phone
8 numbers from Plaintiffs and Defendants written on a single
9 piece of paper and delivered to me. It's my practice, once
10 a verdict has been returned and accepted by the Court, to
11 visit with the jury in the jury room, thank them personally,
12 look them in the eye, and shake each hand. I believe their
13 service warrants that in this case, regardless of what the
14 verdict is.

15 My practice is also to give them two representative
16 cell phone numbers from each side in the case and tell them
17 that if they want to talk about their service in the case,
18 they're free to call at their convenience on either or any
19 of those cell phone numbers. And if they don't have a
20 desire to talk with the lawyers in the case, then they're
21 certainly not obligated to in any way. That, I think, is a
22 better process than making you stake them out on the front
23 steps of the courthouse.

24 All right. Pending either a note from the jury or
25 the return of a verdict, we stand in recess.

1 COURT SECURITY OFFICER: All rise.

2 (Recess.)

3 (Jury out.)

4 COURT SECURITY OFFICER: All rise.

5 THE COURT: Be seated, please.

6 All right. Counsel, you all got a phone call
7 telling you we had received a note from the jury. While we
8 were assembling everybody, we got a second note from the
9 jury.

10 I'll start with the first one. I'll mark the first
11 one in the upper right-hand corner with the
12 numeral 1 to indicate it's the first jury note received, and
13 I'll hand it to the courtroom deputy.

14 And I have two copies for each side in the case.
15 If you'll approach the courtroom deputy, we have two copies
16 for Plaintiffs and two copies for Defendants.

17 And I'll go over the note with you, and then we'll
18 talk about it.

19 Can you please provide eight copies of the
20 questions so all of us can review them?

21 I take that that to mean the verdict form, and I've
22 already got eight copies of the verdict form printed.

23 Then below that, it says: Can you please provide
24 the following exhibits.

25 And then you see the list there.

1 The first two do not have PX or DX in front of
2 them. I want you to visit with each other and see if you
3 can agree without me going back to the jury for
4 clarification what they're asking for there.

5 And then the final component of this note is that
6 they want the correspond -- the email correspondence between
7 the parties from August of 2016 and the present or between
8 August 16 -- between August 2016 and the present.

9 And it's signed by Mr. Whiteland, who is Juror
10 No. 2. He apparently is our foreperson.

11 Does everybody agree that eight copies of the
12 questions means the verdict form?

13 MR. STEVENSON: I didn't hear your question, Your
14 Honor.

15 THE COURT: Does everyone agree that the request
16 for eight copies, quote, of the questions means the verdict
17 form?

18 MR. STEVENSON: I think that's right, yes.

19 THE COURT: Does that sound right to you, Ms. Doan?

20 MS. DOAN: Yes, Your Honor.

21 THE COURT: Okay. I've got those.

22 Why don't we go off the record and let you visit
23 about these specific exhibits?

24 We're off the record.

25 (Off the record discussion.)

1 THE COURT: Let's go back on the record.

2 Let me tell you about Note No. 2, which I'm marking
3 in the same way for identification and handing to the
4 courtroom deputy. I'll read it first, and then I have two
5 copies for each side.

6 It simply says: Can we please have one more
7 whiteboard?

8 My thought would be that we take the easel with the
9 pad on it, tear off any sheets that have been written on,
10 and then send it back in with a magic marker. That's close,
11 and that's handy.

12 Does anybody feel differently?

13 MR. STEVENSON: Agreed.

14 MS. DOAN: Agreed.

15 THE COURT: All right. Well, here are copies of
16 the note if you'd like them. You can have them for your
17 files from the courtroom deputy.

18 Let me suggest, then, with regard to Note No. 1
19 that those paralegals from both sides of the case that
20 have been working with Ms. Lockhart come forward, and the
21 three -- one from each side and Ms. Lockhart, the three of
22 you collectively pull and identify these specific exhibits
23 that have been asked for so that we can get those correctly
24 pulled and in hand.

25 And then I will prepare a response that sends them

1 eight copies of the jury form, the easel and the board
2 that's on it, and these specific exhibits telling them
3 that we are working to pull together the email
4 correspondence, and we'll send that to them as soon as we
5 have it in hand.

6 Does that sound all right to both the parties?

7 MR. STEVENSON: Agreed.

8 MS. DOAN: It does. I believe on all of the email
9 correspondence, not all of it is an exhibit.

10 THE COURT: That's something you all are going to
11 have to work through once we get this sent back in.

12 All right. I'll verify your agreement to my
13 written response before I send it in. In the meantime,
14 let's work on pulling the exhibits. Let's make sure that
15 the board is clean, and there's nothing on any of the
16 sheets. We'd hate for them to see Mr. Baxter's spelling of
17 Verizon again. And --

18 MR. BAXTER: Thank you, Your Honor.

19 THE COURT: And then I'll be back with a note to
20 read to make sure everybody agrees with it.

21 (Recess.)

22 THE COURT: All right. Let's go back on the
23 record.

24 Counsel, if you'll approach, I have an unsigned
25 copy of a response you can each have to look at.

1 It reads as follows: Response to Jury Note No. 1
2 and 2. Members of the jury: In response to your Notes
3 No. 1 and 2, I'm sending you the following:

- 4 A. Eight duplicate copies of the verdict form;
5 B. An easel with a blank pad and markers;
6 C. The following exhibits as requested.

7 And then I've listed the specific exhibits as
8 identified in the jury's note.

9 Then I say: Regarding the requested email
10 exhibits, we are gathering them now and will send them to
11 you shortly and when they are assembled.

12 Does either side have objection to this written
13 response being sent in with the pad, the markers, the
14 exhibits, and the copies of the verdict form?

15 Any objection from Plaintiffs?

16 MS. DOAN: No objection.

17 MR. BURMAN: No, Your Honor.

18 THE COURT: From Defendants?

19 MR. STEVENSON: No objection.

20 I guess one question, Judge, before -- on the
21 handwritten note, it looks like the fourth entry is PX-74,
22 though you have PX-78.

23 THE COURT: Yes, you're right. It's a typo. Let's
24 check the rest of the numbers real quickly.

25 MR. STEVENSON: I just did. They look good.

1 MR. BURMAN: They look fine.

2 THE COURT: All right. Let me re-print it with
3 that one correction, and with that correction, everybody is
4 good for me to send it in with these items, correct?

5 MR. STEVENSON: Agreed.

6 MR. BURMAN: Agreed.

7 THE COURT: Okay. We'll go off the record while I
8 make that correction, and then I'll send them in with the
9 Court Security Officer.

10 (Recess.)

11 THE COURT: Let's go back to the record, please.

12 I'll hand the signed response to Jury Note 1 and 2
13 with eight copies of the verdict form, the requested
14 exhibits, and I'll hand those to the Court Security Officer,
15 as well as direct the Court Security Officer to deliver the
16 easel with blank pads and markers together with these items
17 to the jury.

18 And once the emails requested, both sides are
19 satisfied they have those in hand, let the Court know, and
20 I'll reconvene.

21 In the meantime, we stand in recess.

22 (Recess.)

23 THE COURT: All right. Let's go back on the
24 record. Let me ask the parties through their counsel to
25 give me an update on the accumulation of the emails

1 requested by the jury in their first jury note.

2 Where are we?

3 MS. DOAN: Your Honor, Jennifer Doan for the
4 Plaintiff.

5 We have two pieces of -- of email correspondence
6 between HTC and Ericsson -- Ericsson between August 2016 and
7 the present. They are PX-0189 and PX-0250.

8 There is also a PX-0012, which is correspondence
9 between the parties dated June 14th, 2018. It's a letter as
10 opposed to an email. And we're fine with it going back, but
11 the Defendants have raised an objection because it's not
12 technically an email as requested.

13 THE COURT: What's Defendants' position on this?

14 MR. MATHEWS: Your Honor, PX-189 and PX-250 we
15 agree are email correspondence and should go back.

16 The other exhibit is a letter that was sent
17 concurrently with our FRAND contention deadline. It is not
18 email correspondence between the parties, and we don't think
19 it falls within the scope of what the jury requested.

20 THE COURT: Do you have the jury's original note,
21 Ms. Lockhart? Can you pass it back to me?

22 Let me see this letter, please. Somebody pass me
23 up a copy.

24 Is there anything substantively about the document
25 that you're opposed to, Mr. Mathews, or is it simply just a

1 very narrow reading of the jury's note with regard to the
2 difference between an ordinary letter and email?

3 MR. MATHEWS: It's the latter, Your Honor.

4 Your Honor, if I may, I have one more thing.

5 THE COURT: You may.

6 MR. MATHEWS: I think the way we do interpret the
7 jury's note is they're referring to the email correspondence
8 that Ms. Doan showed on the ELMO during cross-examination of
9 Mr. Earle, and this particular letter falls far outside the
10 scope of that, as well.

11 THE COURT: And I gather this letter, PX-12, was
12 published to the jury at some part in the -- some point in
13 the trial?

14 MS. DOAN: It was, Your Honor. It was covered with
15 the first witness. It was covered also, I believe, with
16 Mr. Earle. I'm not sure about that, but it has been before
17 the jury twice.

18 THE COURT: Was it presented at or near the same
19 time as the emails were presented, or is it widely separate?

20 MS. DOAN: No, it's -- it's the correspondence
21 chain, and that is the end of the chain. That letter and
22 there's a letter two weeks later where they sent a letter
23 about a WiFi license.

24 MR. MATHEWS: Yes, Your Honor, the letter is
25 14 months after the email correspondence between Mr. Woo and

1 Mr. Earle that Ms. Doan went through.

2 We don't think it's -- and I believe it was used
3 with Mr. Woo on the first day of trial, I believe. I don't
4 believe that this particular exhibit was used with Mr. Earle
5 when Ms. Doan was going through all the email
6 correspondence.

7 THE COURT: And am I correct there's a letter in
8 evidence two weeks after this one, another letter?

9 MS. DOAN: I don't believe the one two weeks later
10 came into evidence, Your Honor. It doesn't look like it's
11 in the box. It was a totally separate -- different -- it's
12 one of the early attempts for a WiFi license that they were
13 giving us.

14 THE COURT: And the emails that are exchanged that
15 are the other exhibits that you all have agreed on, those
16 were sent -- what's the time period covered by those emails?

17 MS. DOAN: One -- one is maybe November/December of
18 2016, Your Honor. That's Exhibit PX-0189, and then PX-250
19 looks like it is July 2017. Hold on. It may be June 2017,
20 June 2017, Your Honor.

21 THE COURT: You don't disagree with that,
22 Mr. Mathews?

23 MR. MATHEWS: I don't disagree with the dates.

24 THE COURT: Well, I understand this is a
25 traditional letter and not an email. It does fall within

1 the time range the jury's identified. It is directly
2 between HTC and Ericsson.

3 And the request in the note says email
4 correspondence. I'm going to take a broader rather than
5 narrower view, and I'll note Defendants' objection, but I'm
6 going to send the letter back together with the other
7 exhibits.

8 MR. MATHEWS: Thank you, Your Honor.

9 THE COURT: I can send the jury note saying, oh, by
10 the way, there's a letter, but they'd immediately asked to
11 see the letter anyway.

12 MR. MATHEWS: I agree.

13 MS. DOAN: Your Honor, one further matter, can --
14 does the Court wish to address the email correspondence that
15 we went through with Mr. Woo and Mr. Earle? It's all
16 demonstrative.

17 THE COURT: No.

18 MS. DOAN: No, no, I mean, it's a new bag, but just
19 somehow advising them these are all the -- all the
20 correspondence so they don't think we're missing anything.

21 THE COURT: I'm going to send them this, and if
22 they have questions, I'm sure they will send a further note.

23 MS. DOAN: Yes, Your Honor.

24 THE COURT: All right. Ms. Lockhart, do you have
25 the other exhibits in hand?

1 Let's do this, counsel, following the earlier
2 practice of the Court, let's go off the record.

3 I will craft a written response to accompany these
4 exhibits to the jury. We'll come back on the record when
5 I have it ready. I'll review it with you and make sure you
6 have no objections.

7 We're off the record.

8 (Off the record discussion.)

9 THE COURT: We're back on the record.

10 I have copies for each side which I'm going to send
11 in which will accompany these emails that
12 relate to the jury's idea.

13 This is supplemental response to Jury Note No. 1.

14 Members of the jury, in further response to your
15 Note No. 1 regarding email correspondence between HTC and
16 Ericsson, between August of 2016 and the present, I am
17 sending you the following:

18 PX-189, PX-250, and PX-12.

19 Is there any objection to this written response
20 accompanying those exhibits to be sent to the jury?

21 MS. DOAN: No objection from the Plaintiff, Your
22 Honor.

23 MR. MATHEWS: Not from Defendant, Your Honor.

24 Thank you.

25 THE COURT: All right. I'll hand the signed note

1 with the exhibits to the Court Security Officer and direct
2 that he deliver them to the jury.

3 I'll also hand an executed original of this note to
4 the courtroom deputy for the file.

5 And with that, pending either another note or the
6 return of a verdict, we stand in recess.

7 (Recess.)

8 COURT SECURITY OFFICER: All rise.

9 THE COURT: Be seated, please.

10 Counsel, the Court has received a third note from
11 the jury. I'll read it, and then I will share with you what
12 I believe an appropriate written response will be, and then
13 I'll take your comments.

14 The notes reads as follows: Your Honor, please
15 help us frame Question No. 1 in different terms. We have
16 great difficulty getting the jurors to agree on what the
17 question is asking. Thanks.

18 And there's a signature for Mark Whitehead, who
19 I assume is the foreperson.

20 Interestingly enough, the handwriting of the
21 question is very different than the signature of the
22 foreperson.

23 Here. And I'll mark that as No. 3 for
24 identification and deliver it to the courtroom deputy.

25 Here, counsel, are copies of what I believe an

1 appropriate written response will be. I have two for each
2 side. If you'll approach and get them from the courtroom
3 deputy.

4 I'll read this proposed response into the record
5 and take your objections.

6 Members of the jury, the parties and the Court have
7 worked diligently in a manner that is consistent with the
8 law and the evidence.

9 The Court cannot reward, rephrase, or otherwise
10 restate any of the three questions in the verdict form.

11 You should carefully consider and weigh the
12 evidence presented during the trial, and from that determine
13 what you believe is the correct answer to Question No. 1, as
14 well as the other questions in the verdict form.

15 Are there comments, objections, or other input from
16 Plaintiff or Defendant on this response?

17 MR. STEVENSON: No objection.

18 THE COURT: Anything from Plaintiffs?

19 MR. BURMAN: The only suggestion, Your Honor, would
20 be I guess we had it split between 2016 and 2018 yesterday,
21 whether that might help, but...

22 THE COURT: And that was raised yesterday, and I'm
23 very well your fellow counsel is preserving that error or
24 what you think is an error, but I'm not going to submit the
25 ultimate questions in two different time frames to the jury.

1 MR. BURMAN: Understood, Your Honor.

2 THE COURT: I made that decision earlier, and I'm
3 not going to change it now.

4 MR. BURMAN: Understood. Otherwise, Your Honor,
5 we're fine with that.

6 THE COURT: Having heard that I'm going to execute
7 this written response.

8 Ms. Lockhart, here's a signed copy for the Court's
9 file.

10 COURTROOM DEPUTY: Thank you.

11 THE COURT: All right. Counsel, pending another
12 note or a verdict, we stand in recess.

13 COURT SECURITY OFFICER: All rise.

14 (Recess.)

15 COURT SECURITY OFFICER: All rise.

16 THE COURT: Be seated, please.

17 All right. Counsel, we've received a fourth note
18 from the jury. I've marked it as No. 4 for identification.
19 After I've read it, I will deliver the original to the
20 courtroom deputy.

21 Your Honor, we would like the email which compares
22 HTC counter proposal and Ericsson counter proposal which HTC
23 ultimately rescinded.

24 Signed by Mr. Whiteland as the foreperson. Again,
25 the handwriting is not that of the foreperson.

1 I'll hand the original note to the courtroom
2 deputy.

3 I have a proposed written response. If you want to
4 approach, I have copies for each side. I'll read it into
5 the record, and then I'll take any feedback from the parties
6 regarding my proposed response.

7 Members of the jury, in response to
8 Jury Note No. 4, the Court has previously sent to you per
9 your request the email correspondence between HTC and
10 Ericsson from August 2016 through the present.

11 Any comparisons that you are asking for were
12 presented as demonstratives which are not evidence.

13 However, the sworn testimony of a witness using a
14 demonstrative is evidence. You must rely upon your memory
15 of the evidence presented during the trial as the basis to
16 answer the questions in the verdict form.

17 Are there objections to that written response from
18 either party?

19 It seems to me that we've already sent them the
20 email correspondence that can cover any offers or counter
21 offers, and they must be thinking about a demonstrative
22 comparative chart. That was the basis for my response.

23 MR. STEVENSON: Your Honor, may we have a moment or
24 two to confer?

25 THE COURT: Yes.

1 MR. STEVENSON: We think we might be able to figure
2 out what it is. But can we confer before responding?

3 THE COURT: We'll go off the record, during which
4 time counsel can confer with their co-counsel.

5 We're off the record.

6 (Off the record discussion.)

7 THE COURT: Let's go back on the record.

8 Let me hear responses from the parties with regard
9 to the jury's Note No. 4.

10 Mr. Stevenson?

11 MR. STEVENSON: I believe after looking through the
12 exhibits, the DX-336 is the email chain they are interested
13 in, and I have no objection to it going back.

14 THE COURT: DX what?

15 MR. STEVENSON: 336.

16 THE COURT: Mr. Burman?

17 MR. BURMAN: I'm confused, Your Honor. I -- it
18 could be that one. It seems to me -- I don't know why
19 they'd be looking at 2013. I had thought that probably
20 between this and Question 3 that they were conflicted on
21 whether they had to find both 2016 and 2018 or whether they
22 could do either/or. But now I don't know what -- why
23 they're --

24 THE COURT: Well, let me ask this, do you object to
25 the Court sending back DX-336?

1 MR. BURMAN: No, Your Honor.

2 THE COURT: I'm either going to do that or tell
3 them I'm not sending you anything and just consider your
4 memory of the evidence.

5 So let me recompose a written response in light of
6 DX-336. And I'll be back to present it to you for further
7 comment in just a minute. But until then, we're off the
8 record.

9 COURT SECURITY OFFICER: All rise.

10 (Recess.)

11 THE COURT: All right. Counsel, let's go back on
12 the record.

13 If you want to approach, I have two copies of a
14 proposed written response in light of the last discussion
15 about Jury Note No. 4. I'll read it and then get your
16 reactions to this proposed response.

17 In response -- members of the jury, in response to
18 Jury Note No. 4, the Court has previously sent to you for
19 your request the email correspondence between HTC and
20 Ericsson from August of 2016 through the present. However,
21 with the agreement of the parties, I am sending you DX-336,
22 which will hopefully be helpful to you.

23 As I have previously instructed, you must rely on
24 your memory of the evidence presented during the trial as
25 the basis to answer the questions in the verdict form.

1 Any objection from Plaintiff or Defendant?

2 MR. STEVENSON: No objection.

3 MR. BURMAN: No objection, Your Honor.

4 THE COURT: All right. Then I'll sign the written
5 response to Jury Note No. 4, I'll put with it DX-336, and
6 I'll deliver those to the Court Security Officer with
7 instructions to deliver the same to the jury.

8 I'll also sign a duplicate of that written response
9 and deliver it to the court security -- the courtroom
10 deputy.

11 Now, pending another note or a verdict, we stand in
12 recess.

13 COURT SECURITY OFFICER: All rise.

14 (Recess.)

15 COURT SECURITY OFFICER: All rise.

16 THE COURT: Be seated, please.

17 All right. Counsel, I've received the following
18 from the jury.

19 Your Honor, we have reached a verdict.

20 It is signed by Mr. Mark Whiteland, who I'm
21 assuming is the foreperson of our jury. I'll hand the note
22 to the courtroom deputy.

23 And I'll direct the Court Security Officer to bring
24 in the jury.

25 COURT SECURITY OFFICER: All rise.

1 (Jury in.)

2 THE COURT: Please be seated.

3 Mr. Whiteland, I understand that you're the
4 foreperson of the jury; is that correct?

5 THE FOREPERSON: Yes, sir.

6 THE COURT: Has the jury reached a verdict?

7 THE FOREPERSON: Yes, sir, we have.

8 THE COURT: Would you hand the signed and dated
9 verdict form to the Court Security Officer who will bring it
10 to me?

11 All right. Ladies and gentlemen of the jury, I'm
12 going to announce the verdict into the record at this time,
13 and I'm going to ask each member of the jury to listen very
14 carefully as I do this, because after I have announced the
15 verdict, I'm going to poll the jury to make sure on the
16 record that this is the unanimous verdict of all eight
17 members of the jury.

18 Turning to the verdict form and turning to Page 2
19 where Question 1 is located: Did HTC prove by a
20 preponderance of the evidence that Ericsson breached its
21 contractual obligation to offer HTC a license on FRAND terms
22 to Ericsson's cellular standard essential patents?

23 The answer is no.

24 Question 2 found on Page 3 of the verdict form:
25 Did HTC prove by a preponderance of the evidence that

1 Ericsson breached its duty of good faith in carrying out its
2 contractual obligation to negotiate with HTC for a license
3 to Ericsson's cellular standard essential patents?

4 The answer is yes.

5 Turning to Page 4 of the verdict form wherein
6 Question 3 is located: Did Ericsson prove by a
7 preponderance of the evidence that HTC breached its duty to
8 negotiate with Ericsson in good faith for license for
9 Ericsson's cellular standard essential patents?

10 The answer is yes.

11 The fifth and final page of the verdict form is
12 dated with today's date, and it's signed
13 by Mr. Mark Whiteland as foreperson of the jury.

14 Ladies and gentlemen, let me poll you at this time
15 to make sure that this verdict is the unanimous decision of
16 the entire jury.

17 If this is your verdict as I have read it into the
18 record, would you please stand at this time?

19 (Jury polled.)

20 Thank you, please be seated.

21 Let the record reflect that all eight members of
22 the jury immediately stood in response to the Court's
23 question to poll the jury, and the Court finds that this is
24 the unanimous verdict of all eight members of the jury.

25 The Court accepts the jury's verdict, and I'll

1 deliver the original verdict form as executed to the
2 courtroom deputy.

3 Ladies and gentlemen, this now completes the trial
4 of this case. I've instructed you over and over again
5 throughout the trial not to communicate with anyone about
6 your service as jurors or about anything that happens during
7 the trial. I'm now releasing you from that instruction, as
8 well as the other instructions and obligations that you've
9 had as jurors.

10 You're free to talk about your service with anyone
11 you'd like to. You're also free not to talk with anyone
12 about your service as jurors if -- if you wouldn't like to.

13 The practice in this district has long been that
14 the lawyers who compose the trial teams are not at liberty
15 to contact you or to initiate a conversation with you about
16 your service.

17 However, if you would like to communicate or talk
18 with any of them about your service, you certainly are free
19 to do that, and they certainly would be interested in any
20 feedback that you would feel inclined to give them.

21 You will probably see one or more of them as you
22 pass outside the jury room through the building to your
23 respective cars when you leave, and if you want to talk to
24 them, stop and talk. I guarantee you, if you initiate a
25 conversation, they'll want to talk to you. If you don't,

1 don't initiate a conversation. They will not initiate one
2 with you, and you're free just to walk to your vehicles or
3 go wherever you'd like to go.

4 I do have a copy of two cell phone numbers, two
5 from the Plaintiffs' lawyers and two from the Defendants'
6 lawyers, and I'm going to give those to you in a few
7 minutes. If tomorrow, next week, or whenever you would feel
8 inclined to reach out to either or all of them, you'll have
9 cell phone numbers where you can call or text or do that.
10 If you don't want to, you're under no obligation to, and you
11 certainly don't have to.

12 But I want you to understand, any communications
13 about your service as jurors is up to you, and it's up to
14 you alone. It is strictly your prerogative.

15 Also, ladies and gentlemen, on behalf of the Court,
16 I want to -- I want to sincerely thank you for your service
17 in this case. This has -- this has been a difficult trial.
18 And there are no easy cases that get to a jury trial in a
19 United States District Court. And I can -- I can rarely, if
20 ever, remember a jury more attentive, more focused, and more
21 engaged than you've been throughout this week. And I want
22 to thank you for that.

23 Also, ladies and gentlemen, I told you when you
24 were empaneled as the jury that you were doing very real and
25 important public service by making the sacrifice to serve as

1 jurors. And I believe that with my whole heart.

2 It is my practice since I have been a federal judge
3 when a verdict is returned in a case like this to ask the
4 jury for a favor, and I'm going to ask you for a favor now.

5 We are through with this trial, and you are
6 released as jurors, but before you leave the building, I'm
7 going to ask as a personal favor that you go back in the
8 jury room for just a couple minutes.

9 I'd like the honor to come into the jury room and
10 shake each one of your hands and look each one of you in the
11 eye and tell you personally how much the Court as an
12 institution and me individually appreciate what you've done
13 and the service you've rendered as being jurors.

14 I won't keep you, it won't take long, but if you
15 would afforded me that personal privilege, I would
16 appreciate it very much. I think what you've done warrants
17 that is kind of particularized thanks and appreciation, and
18 it would be an honor for me to have a --just a moment of
19 your time to do that before you leave.

20 Counsel, that completes the trial of this case.

21 Ladies and gentlemen of the jury, if you'll meet me
22 in the jury room, I'll be there in just a minute.

23 Counsel, you're excused.

24 COURT SECURITY OFFICER: All rise.

25 (Court adjourned.)

CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/S/ Shelly Holmes 2/15/19
SHELLY HOLMES, CSR, TCRR Date
OFFICIAL REPORTER
State of Texas No.: 7804
Expiration Date: 12/31/20